SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 573

MAX N. KOHLER, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Petitioner,

vs.

MRS. ELIZABETH McCLELLAN HUMPHREY, AS TESTAMENTARY EXECUTRIX OF BYRON C. McCLELLAN, DECEASED, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable the Supreme Court of the United States of America:

The petition of Max N. Kohler, individually and on behalf of others similarly situated, appellant in the above entitled and numbered cause, respectfully represents:

1. That the opinion and decree rendered by the United States Circuit Court of Appeals for the Fifth Circuit on July 12, 1946, is erroneous, contrary to the law and the evidence and prejudicial to the interest of petitioner both in-

dividually and on behalf of others similarly situated, and that judgment should be ordered properly amended by this Court, for the following reasons:

(a) The Court erred in not holding that a sale sought to be made and purportedly consummated by sheriff sale could include items or things which had not been clearly described and itemized in detail and appraised in the inventory and advertisement of such sale was a nullity; particularly when

(1) the sale was said to include all rights and claims against the officers and managing directors of the corporation foreclosed against, without detailing

(A) the names of the person against whom the claim existed;

(B) the amount of the claim;

(C) the nature of the claim.

(2) such a claim was as is shown by this litigation in the millions;

(3) such a claim was for the fraud and deceit and the damages caused by the acts of the said directors in looting the corporation.

(4) such directors were the managing directors and had not put any claims of such nature on the books of the company, and could hardly have been expected to expose their own fraud, deceit, and wrongdoing which looted the corporation.

(5) the claim was not appraised and a bidder at such a sale could not tell whether such a claim was for one penny or for many millions of dollars.

b. that the Court erred in holding that "there is nothing in the complaints to connect the other defendants with the

plan or the execution of the plan. In dismissing the suit the Court below acted properly as to all claims and all defendants except as to the claims against the defendant McClellan arising out of the sale," because the bill of complaint

(1) does show a claim upon which relief should have been granted against other defendants;

(2) if, as we believe the sale of claim against the erring directors and others by the Sheriff did not include claims which were not itemized, appraised, or even shown on the books of the company, as we say it could not have included them, then certainly a claim for relief was shown;

(3) is a stockholders bill to recover for the stockholders of the corporation and the plaintiff the loot carried off by the ones who despoiled the corporation of its assets—who can certainly not be expected to sue themselves for recovery, if they are guilty.

(4) was by the plaintiff sought to be properly supplemented by the obtention of a bill of discovery in the District Court, and that Court recalled its order permitting discovery and heard motions to dismiss on the face of the papers without permitting such discovery to be attempted.

(5) is a bill claiming fraud, deceit and the damages done thereby, and great leniency in obtaining discovery by a bill of discovery should have been permitted.

(c) the District Court and the United States Circuit Court of Appeals should, rather than have dismissed the suit against the other defendants, have ordered the amendment of the bill of complaint instead, if it was felt the bill of complaint was not sufficiently clear.

WHEREFORE, for the reasons set forth hereinabove and in the briefs to be filed, petitioner, individually and on behalf

of others similarly situated prays that this Court do issue a writ of certiorari herein, and that in due course the judgment of the United States Circuit Court of Appeals for the Fifth Circuit shall be properly amended.

And petitioner further prays for all general and equitable relief.

SIDNEY G. ROOS,
BERTRAND I. CAHN,
Counsel for Petitioner,
501 Canal Bldg.,
New Orleans, La.

STATE OF LOUISIANA,
Parish of Orleans:

Max N. Kohler, being duly sworn, says:

That he is the applicant for certiorari in the above and foregoing petition for certiorari and that the statements therein contained are true, save those made on information and belief, and as to those, affiant verily believes them to be true.

MAX N. KOHLER.

Sworn to and subscribed before me this 25th day of September, 1946.

ROBERT J. OSTER,
[SEAL.] *Notary Public.*

Comm. for life.

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CHARLES ELMORE CROPL
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IN THE

Supreme Court of the United States

OCTOBER TERM 1946.

No. 573

MAX N. KOHLER, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,

Appellants and Applicants,

versus

BYRON C. McCLELLAN, ET AL.,

Appellees.

APPLICATION FOR CERTIORARI.

BERTRAND I. CAHN,
SIDNEY G. ROOS,
Attorneys for Appellants.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946.

No.

MAX N. KOHLER, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED,
Appellants and Applicants,

versus

BYRON C. McCLELLAN, ET AL.,
Appellees.

BRIEF ON APPLICATION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

Max N. Kohler, individually and on behalf of others similarly situated, Appellant in the above entitled and numbered cause, was aggrieved by the judgment rendered in this cause by the United States Circuit Court of Appeals for the Fifth Circuit, on August 12th, 1946, and believing it was not in keeping with the law asked that a rehearing should be granted Appellant in this cause, which was denied.

On Page 5 of the decision of which Appellant complains, the Circuit Court said:

> "Only upon the seizure and sale of specific property must the description positively identify the property."

and they cited the case of *Roberts vs. Medlock*, Ct. App. La., 1933, 148 So. 474, 475; and that of *Saucier vs. Crichton*, C. C. A. 5th, 147 F. (2d) 430.

We then urged and now urge your Honors that the *Roberts v. Medlock* case is one in which partition proceedings were had under an article of the Civil Code and that the *Saucier vs. Crichton* case was one in which Succession proceedings, also covered by the Articles of the Civil Code, were involved.

It must be noted that our complaint is that mandatory articles of the Louisiana Code of Practice, particularly Art. 671, were not complied with and that we complain that as a result thereof, the attempted sales, which described nothing, gave no names of debtors, gave no amounts of their indebtedness to the corporation or the nature of the claims, could certainly not convey title to any person, of those claims. It is law, well known to your Honors, that where any conflict, between the Revised Statutes, the Civil Code of Louisiana and the Code of Practice of Louisiana, is encountered, that the Code of Practice prevails.

It is also true, as was held in the case of *Rotschild v. Ritter*, Fed. Rules Decisions, Vol. 4, No. 15 (Nov. 1945)

pages 495, 496; and *Lamar v. Micou*, 114 U. S. 218, 5 S. Ct. 857, 9, 29 L. Ed. 94:

> " 'The law of any state of the Union, whether depending upon statutes or upon judicial opinions, is a matter of which the courts of the United States are bound to take judicial notice, without plea or proof.' And in *Burntisland Shipbuilding Company v. Barde Steel Products Corporation*, D. C., 278 F. 552, Judge Morris quotes from *O'Dell v. Southern R. Co.*, D. C., 248 F. 345, 348, as follows: 'The United States courts take judicial cognizance of the public laws of all the states in the Union. There is therefore no more necessity to plead the law of any state in the Union in a United States court than it would be in the state court to plead the law of that state.' See also *Strickland v. Humble Oil & Refining Company*, 5 Cir., 140 F. 2d 83."

We call your Honors' attention to the fact that the question of the sale of rights in the *Roberts vs. Medlock* case, is not a part of that case at all and is mere *obiter dicta* of the Court. That case came up only upon a question of the adequacy of a description of real estate and in reference to rights, the credits belonging to the *Succession of George W. Miller*, were not at issue in that case. Besides, a Civil Code Article expressly authorizes the sale of an heir's interest in the Succession without the necessity of describing in detail, what interests the heir has, and the sale of such interest is translative of all his title to both real and personal property of the Estate, in which he had the interest.

We concede that if he had stated that all accounts and/or notes payable to the corporation, were being sold, a prospective purchaser could have ascertained the names of the debtors and the amounts claimed against him, which would have necessarily appeared on the books of the corporation, but even then a sale without appraisement would have been invalid under Article 671 of the Code of Practice of Louisiana, but no prospective purchaser could possibly have known, from the advertisement in question, the nature of the claims that were being sold, the amounts thereof or the names of the debtors. Could anyone possibly have known, from the advertisement, that claims against Leftwich & Moss for stocks of the National Linen Service, as set forth in our brief, (page 39, par. 19), were being sold? And besides, anyone claiming, in such a suit as this, rights from a Sheriff's sale, must do so as a defense to our suit.

Even in the case of Tax Sales,—a case where the sales enure to the benefit of the sovereign hold, that even constitutional provisions invoked, do not cure tax titles, where descriptions are insufficient to identify the property. *Shelly vs. Freidricks*, 42 So. 218, 117 La. 679, and in the cases of *Thibodaux vs. Kelly*, 29 La. 508; *Morris vs. Hankins*, 188 So. 155, 192 La. 504, affirming 185 So. 518 and 185 So. 525; and

It was held in the case of *Wilfert vs. Duson, et al.*, 131 La. 23, 58 So. 1019:

> "The description of the property given in the three Acts of Sale are vague, indefinite, uncertain and misleading.

"The recordation of them in the proper office was not notice to third persons, who subsequently acquired the whole of Section 38, from Francois Dupre, Jr."

C. C. A. La. "A tax deed of Louisiana realty, which described part of lands conveyed wrongly with respect to fractional parts of sections, and described remainder wrongly with respect to range wherein section was located, conveyed no record title as against third party. *Bergeron v. Louisiana Land & Exploration Co.*, 95 F. (2d) 47."

La. 1904. "Where the description in a tax deed is insufficient to identify the land sold, nothing passes by virtue of the tax sale. *Levy v. Gause*, 36 So. 684, 112 La. 789."

La. 1912. "A tax collector's deed, which fails altogether to describe the property of the tax debtor, will not convey title to the tax debtor's property. *Brock v. Satchell*, 58 So. 686, 130 La. 853."

La. 1914. "A tax deed which does not describe city lots so as to identify them conveys no title. *Quaker Realty Co. v. Guibilati*, 66 So. 394, 136 La. 52.

La. 1915. "A tax deed, containing a description of land as 50 acres in the northeast corner of a large area containing two tracts several miles apart **is void.** *Brock v. E. McIlhenn's Son*, 67 So. 951, 136 La. 903."

"A tract of swamp land, which cannot be described otherwise than by the name of the owner and the United States survey, cannot be said to be identified by a description which gives neither. *McHugh v. Albert Hanson Lumber Co.*, 82 So. 392, 145 La. 421."

> La. 1920. "Where it is impossible to identify the land from a description in a tax deed, such deed conveys nothing. *In re Aztec Land Co.*, 85 So. 634, 147 La. 672."

Certainly, if a sale of property invoked by the sovereign must be so correctly described, it should not be less perfectly described in case of a suit of one citizen against another.

And in such a case as ours, this is the rule that governs:

> "A Sheriff's sale of movables or rights and credits, is not valid unless preceded by an appraisement. *Phelps v. Rightor*, 9 Rob. 531; *Succ. of Hiligsberg*, 1 La. Ann. 340; *Stockton v. Stanbrough*, 3 La. Ann. 390; *Crowley Bank & etc. Co. v. Hurd*, 138 La. 978, 71 So. 128."

There is a very thorough discussion of the question involved in the *Tulane Law Review*, Vol. 13, pp. 615-621, in an article written by Joseph J. Piccione.

Among the highlights of that article will be found the following: "The prescriptions of Article 3543 are not intended to cure defects of a grievous nature," citing *Thibodeaux vs. Thibodeaux*, 112 La. 906; 36 So. 800 (1904) and *Phoenix Building & Homestead Association vs. Mereaux*, 180 So. 648 (1938).

Article 2619 of the Louisiana Civil Code of 1870 declares that "judicial sales may be 'declared null in cases of nullity.' Thus the prescriptions can only run against in-

formalities or relative nullities," citing *Wright vs. Calhoun,* 151 La. 998; 92 So. 589 (1922); *Bulliard vs. Davis,* 185 La. 255; 169 So. 78 (1836); *Phoenix Building and Homestead Association vs. Meraux,* 185 So. 48, (La. Ann. 1938) and *Dickey vs. Pollock,* 183 So. 48 (La. Ann. 1938), "and not absolute nullities," citing *Hickman vs. Dawson,* 33 La. Ann. 438 (1881); *Davenport vs. Knox,* 34 La. Ann. 407 (1882); *Decuir vs. Decuir,* 105 La. 481; 29 So. 932 (1901); *Doucet vs. Fenelon,* 120 La. 18; 44 So. 908 (1907); *Brewer vs. Y. & M. V. Ry.,* 128 La. 544; 54 So. 987 (1911); *Wright vs. Calhoun,* 151 La. 998, 92 So. 589 and *Dickey vs. Pollock,* 183 So. 48, La. App. (1938).

It has been especially held that "inadequate identification and description in the assessment of property sold for taxes constitutes an imprescriptible nullity where such description makes uncertain the identity of the property intended to be assessed." *Woolfolk vs. Fonbene,* 15 La. Ann. 15 (1860).

> "Where land sold at Sheriff's sale and conveyance by Sheriff to the purchaser does not correspond in quantity or boundary with the land described in the order of seizure, the Sheriff's sale is radically null." *Landreaux vs. Foley,* 13 La. Ann. 114 (1858).

The Tulane Law Review article, under Note 19, cites decisions which make only certain things relative nullities. So far as the decisions under this footnote 19 are concerned, a careful check of the doctrine of law formulated or upheld in these cases will easily show they are not pertinent to the case at bar.

(1) The Court erred in not holding that all of the defendants were the associates of McClellan because they were defendants in the action; and if not so holding, in not merely holding that the petition was vague and should have been rectified by amendment.

(2) The Court erred in not holding that under the consecutive narrative of wrongs done, all of the defendants should be maintained in this action because under the allegations of the petition it is shown their acts conduced to the wrecking of the corporation.

(3) The Court erred in not holding that the conspiracy charged against McClellan for wrecking the corporation extended to the brokers Weil & Company, and the individual partners and all of the other defendants who assisted him in wrecking the corporation.

(4) The Court erred in not holding that the receipt by the persons named in the bill of complaint of assets of the corporation conduced to the wrecking of the corporation and in not maintaining them as defendants in the action, particular mention being directed to defendants Irving Moss and Charles Leftwich (par. 19 of Bill of Complaint), David E. Verlander (par. 51 (I) of amended Bill of Complaint), and with reference to paragraph (C) of the petition for certiorari, it has been held in *Bowles vs. Sunshine Packing Corporation,* 5 F. R. D. Vol. 5, No. 8, pages 282, 287.

(5) It is a settled principle of law that a complaint should not be dismissed unless it appears to a certainty that the plaintiff would not be entitled to relief under

any set of facts which could be proved in support of the allegations set forth therein. Furthermore, the complaint should be viewed in a light most favorable to the plaintiff, and the truth of the facts well pleaded, including facts alleged on information and belief, or admitted. *Continental Collieries, Inc. v. Schober, Jr.*, 3 Cir., 130 F. 2d 631; 28 U. S. C. A. following section 723c, Federal Rules of Civil Procedure, rules 8(f) and 12(b) (6); *Carroll, et al. v. Morrison Hotel Corporation*, 7 Cir., 149 F. 2d 404; *Garbutt v. Blanding Mines Co.*, 10 Cir., 141 F. 2d 679; *Galbreath v. Metropolitan Trust Co. of California, et al.*, 10 Cir., 134 F. 2d 569.

We therefore urge that a writ of certiorari should be granted in this cause and that in due course the judgment of the lower Court should be amended as prayed for in the petition for certiorari and as the wisdom of this Court shall dictate.

Respectfully submitted,

BERTRAND I. CAHN,
SIDNEY G. ROOS,
Attorneys for Appellants.

This is to certify that copies of this Brief have been served opposing counsel on this 3rd day of October 1946, by ordinary mail.

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